REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 2010-257

IN THE MATTER OF THE SECURITIES INDUSTRY ACT 1995

AND

IN THE MATTER OF THE SECURITIES INDUSTRY
(TAKE OVER) BY-LAWS 2005

AND

IN THE MATTER OF AN APPLICATION BY BWIA MINORITY SHAREHOLDERS
PURSUANT TO BY-LAWS 26 OF THE SECURITIES INDUSTRY
(TAKE OVER) BY-LAWS 2005
TO FIX THE FAIR VALUE OF SHARES IN BWIA

Between

THE MINISTER OF FINANCE
First Appellant/First Defendant

THE TRINIDAD AND TOBAGO SECURITIES AND EXCHANGE COMMISSION
Second Appellant/Second Defendant

And

HORACE REID
Respondent/Claimant

PANEL: I. Archie, C.J
A. Yorke-Soo Hon, J.A
G. Smith, J.A

APPEARANCES:
Mr. M. Daly, S.C., Mr. M. Seepersad instructed by Ms. J. John
for the First named Appellant
Mr. T. Bharath instructed by Mr. A. Le Blanc
for the Second named Appellant

Mrs. L. Seebaran-Suite instructed by Ms. C. Johnson
for the Respondent

DATE DELIVERED: 1st June, 2011

Delivered by G. Smith, J.A.

I agree with the Judgment of Smith J.A. and have nothing to add

I. Archie
Chief Justice

I also agree.

A. Yorke Soo-Hon
Justice of Appeal

JUDGMENT

INTRODUCTION

1. This is a Procedural Appeal that is based upon an issue of jurisdiction which was raised at the first Case Management Conference in this matter.

2. The issue is whether the Court has jurisdiction under By-Law 26 of the Securities Industry (Take-Over) By-Laws, 2005 to proceed with the Respondent's claim to fix a fair value of his shares in British West Indies Airways (BWIA), and for other consequential relief or orders.

3. The trial judge found that the Court did have such jurisdiction and he adjourned the matter to give further directions on the prosecution of the Respondent's claim.

4. In my opinion the Court does not have the jurisdiction to proceed with this claim. Accordingly, I would allow this Appeal.

5. Before proceeding with my analysis of the jurisdiction issue, I need to set out the material facts. All the parties have agreed that these facts are correctly stated in the written decision of the trial judge and I will restate them as he did but with a few alterations.

The Facts

6. (a) BWIA began its operations as a privately owned airline on the 27th day of November, 1940 and went public some sixty (60) years later, that is, on the 4th day of December, 2000. BWIA was listed on the Trinidad and Tobago Stock Exchange (the Stock Exchange) on the 6th day of February, 2001 with a listed price of TT$7.85 per share. The Government of the Republic of Trinidad and Tobago (GORTT) then held 49% of the issued share capital of BWIA.

(b) On the 28th day of June, 2004 BWIA offered for subscription 1,283,488,712 new ordinary shares by way of a rights issue of 27 new shares for every one ordinary share then held at an issue price of TT$0.20 per ordinary share. A number of shareholders did not subscribe to the rights issue but the GORTT did so and as a result, was able to increase its shareholding from 49% to 97.2%, thereby becoming the controlling major shareholder of BWIA.

(c) When BWIA was faced with serious financial problems, GORTT appointed a Task Force in early 2005 to evaluate possible options and make recommendations for the survival of the company. In its report the Task Force made a number of recommendations one of which was to restructure the existing

BWIA into a New Co-Model. The GORTT accepted the recommendation to restructure BWIA.

(d) On the 15th day of November, 2005 BWIA requested the suspension of trading in its shares for a period of three (3) months pending the restructuring process. On the following day the Stock Exchange, which is a self-regulatory organization registered under section 34 of the Securities Industry Act, 1995 (S.I.A.) advised the Trinidad and Tobago Securities and Exchange Commission (the SEC, who is also the Second Appellant) that trading in BWIA shares had been suspended with immediate effect for a period of three (3) months as requested by BWIA.

(e) On the 9th day of February, 2006 BWIA requested of the Stock Exchange a further extension of three months for the suspension of trading in its shares. The extension was granted by the Stock Exchange on the 14th day of February, 2006.

(f) BWIA was not only plagued with financial problems but industrial relations problems as well. In the month of June, 2006 the BWIA Board and the four (4) Collective Bargaining Units that represented the workers of BWIA had reached a dead-lock in their negotiations for a new Collective Bargaining Agreement.

(g) On the 12th day of May, 2006 the Stock Exchange made an application to the SEC to authorise the de-listing of BWIA pursuant to section 45(1) of the S.I.A. The SEC eventually ordered the de-listing of BWIA on the 22nd December 2006.

(h) Sometime in December 2006, the Board of BWIA had mandated a Management team to revisit the recommendations of the Task Force which in early 2005 had recommended a restructuring of BWIA. After reviewing the options of the Task Force, Management recommended to the Board that serious consideration should be given to the creation of a new Airline to replace BWIA. This recommendation ran contrary to that of the Task Force in early 2005.

(i) On the 8th day of September, 2006 BWIA publicly announced its demise following failed negotiations with the four (4) bargaining units. The Company's new CEO one Peter Davies is reported to have said that a new airline, Caribbean Airlines Limited (CAL) which would be based in Trinidad and Tobago, would

replace BWIA. After flying the Caribbean skies for three (3) score and six (6) years BWIA was no longer operational.

(j) Sometime in December 2006 BWIA had engaged the services of Messrs. Pannell Kerr Foster Limited to conduct an appraisal of the fair market value of the minority shareholding of BWIA as at the 31st day of August, 2006 (valuation date).

(k) In their Appraisal Report, Messrs. Pannel Kerr Foster stated that the purpose of the appraisal was to inform the Minister of Finance (Corporation Sole) as to whether any compensation was due to the minority shareholders as at valuation date as a result of the closure of the Company, consequent upon a decision made by GORTT.

(l) On page 11 of its Appraisal Report under the heading **Computation of Net Worth** this is what Messrs. Pannel Kerr Foster said:

> **"There is therefore no net worth applicable to the shareholders as a consequence the shares held by the minority shareholders are worthless."**

(m) On the 28th day of December, 2006 BWIA held its final Annual General Meeting. At that meeting the shareholders were told that BWIA was insolvent and would be closed down and a new airline would be formed and launched in January 2007. An appeal was made to the Chairman as to what would happen to the minority shareholders. The Chairman is reported to have said that it was GORTT which would have to deal with the minority shareholders' interests and that he would convey to GORTT the concerns expressed by the shareholders.

(n) In the ensuing years there is evidence before the Court in the form of public statements, letters and correspondence of one type or another passing between Government Ministers and representatives of the minority share-holders touching and/or concerning the issue of treating with the minority shareholders.

(o) Communication between the parties culminated with a letter from the Minister in the Ministry of Finance, Senator Mariano Browne dated the 3rd day of December, 2008 in which the Honourable Minister stated in part:

"..... it was agreed that a public offer of 20 cents per share would be made to all minority shareholders who were not dealt with. The deadline for this was 31st December, 2008. The reason for the delay is that the approval of the Securities and Exchange Commission was sought. We are now informed that the SEC had advised **an alternative route** which will now be addressed....." **emphasis added**.

(p) Approximately six (6) months later, that is on the 1st day of June, 2009 the Board of Directors of BWIA, acting on the instructions of the GORTT, finally made an offer to compensate all the outstanding minority shareholders at a price of 20 cents per share. The offer was published in the print media on the 3rd day of June, 2009 and was referred to as an "Ex-Gratia Payment."

(q) The offer, having been rejected by the Claimant by letter dated 28th July, 2009, the Fixed Date Claim Form was filed seeking a fair valuation of the shares of BWIA and other consequential relief and/or orders.

ANALYSIS

7. The parties have raised many issues in this Appeal but I consider only two of these to be determinative. I will deal with these two issues first, and later in this judgment I will consider other material issues.

These two issues are as follows:

(A) The GORTT having become the controlling majority shareholder of BWIA in 2004 with a 97.2% shareholding, can a minority shareholder invoke section 26 of the Take-Over By-Laws of March 2005 (By-Law 26) to pursue a fair value application to the Court?

(B) In any event, did the later "Ex-Gratia Payment" offer of the 1st June 2009 by the GORTT to the minority shareholders enable the minority shareholders to invoke the jurisdiction of the Court under By-Law 26?

8. On the facts of this case, I answer no to both questions. Neither event (A) nor (B) invokes the jurisdiction of the Court under By-Law 26.

9. By-Law 26(1) which is central to this Appeal provides as follows:-

> "Where ninety per cent or more of a class of voting or equity securities of the offeree issuer are acquired by or on behalf of the offeror ... then the holder of any securities of that class not counted for the purposes of calculating such percentage shall be entitled in accordance with this section to require the offeror to acquire the holder's securities of that class."

10. It should be noted that these By-Laws only apply to public companies whose shares are traded on the Stock Exchange. Further, the By-Laws were only proclaimed into law on 17th March 2005.

(A) Re The Rights Issue of June 2004

11. For present purposes, I state that the provisions By-Law 26 (1) have the potential of addressing the parties to the rights issue of June 2004 even in the absence of a take over bid. (I will expand on this later in this judgment under the heading Other Issues). This is because (a) BWIA can be an offeree issuer; (b) the GORTT can be an offeror and (c) the minority shareholders of BWIA can be the holders of securities not counted for the determination of a 90% shareholding.

12. By-Law 26 (1) provides that where an offeror (e.g. GORTT) acquires 90% or more of the shareholding of a publicly listed company trading on the Stock Exchange, that offeror may be requested to buy out the minority shareholders (e.g. the Respondent).

13. Later provisions of By-Law 26 expand upon the buy out concept. So for instance, By-Law 26 (4) gives a minority shareholder the option to accept a buy out offer or to have the Court

fix a fair value for his shares. By-Laws 26 (5), (6) and (7) make provision for an application to the Court by an offeror [(26 (5)], or a minority shareholder [(26 (6) and 26 (7)], to apply to the Court to fix a fair value for the shares subject to a buy out.

14. The Respondent argues that upon the proclamation of the By-Laws in March 2005, the buy out provisions of By-Law 26 were activated in respect of the shares of BWIA. In fact, the Respondent contends that the buy out provisions were activated in respect of all public companies trading on the Stock Exchange where there was a shareholder who held 90% or more of any category of the shares of such a company at the date of the proclamation of the By-Laws (March 2005).

15. In this matter, the buy-out offer of the GORTT at TT$0.20 cents per share on 1st June 2009 (the Ex-Gratia Payment offer) was unacceptable to certain minority shareholders, hence one such shareholder (the Respondent) has brought this claim under By-Law 26 to force the GORTT to buy out his shares at a fair value to be fixed by the Court.

16. I find that the rights issue of June 2004 does not invoke the provisions of By-Law 26. I say so for the following two reasons.

17. Firstly, the 90% buy out and fair value provisions of By-Law 26 created a new right that did not exist before March 2005. A 90% majority shareholding in a public company trading on the stock exchange by itself gave no rights to minority shareholders prior to March 2005. Therefore, when the GORTT acquired the 97.2% shareholding in BWIA in June 2004, it gave no right to any minority shareholder to invoke any buy out or fair value scenario.

18. Secondly, to construe the later provisions of By-Law 26 as being applicable to the prior acquisition of the 90% majority in BWIA by the GORTT would be contrary to the principle against the retrospective operation of statutes.

As is stated in Maxwell on the Interpretation of Statutes in emphatic terms:

> "It is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation unless such a construction

appears very clearly in the terms of the Act, or arises by necessary and distinct implication."[1]

19. In the present matter, By-Law 26 does not clearly express itself to have retrospective effect, nor is such retrospective application a necessary and distinct implication of By-Law 26. To apply By-Law 26 to the prior rights issue of June 2004 would be to give the section a retrospective effect when this is not even suggested in the By-Law.

20. Further, as is stated in Benyion on Statutory Interpretation, "If a construction inflicts a detriment, that is a factor against it [having retrospective effect]. A retrospective enactment inflicts a detriment ... if it takes away or impairs a vested right acquired under existing law, or creates a new obligation or imposes a new duty .... in regards to events already past." (My emphasis).[2]

A retrospective interpretation of By-Law 26 to the prior rights issue would inflict a detriment on the GORTT in the sense of at least creating new obligations and duties (e.g. buy out and fair value assessments) in regards to events already past.

21. The Respondent argues that an exception to the general principle against the retrospective operation of statutes can apply here. The Respondent states that the exception applies to provisions which are designed for the benefit or protection of the public.[3] I do not accept that statement. It is too sweeping an interpretation of an exception to the rule against retrospectivity.

The exception which the Respondent seeks to invoke is one where a statute imposes a penalty on a person by reference to a past event. The case cited in support of the exception is R v Vine (1975) L.R. 10 Q.B. 195. In R v Vine, a statute passed in 1870 prohibited persons convicted of felonies from holding licences to sell spirits. The individual in question in that case had been convicted in 1865 and obtained a licence in 1873. The Court held the licence to be void because of the prior conviction. The Court decided this matter on the reasoning that the object of the enactment was not to punish offenders but to protect the public against public houses in

[1] See Maxwell on the Interpretation of Statutes 12th ed pages 215 et seq and see Benyion on Statutory Interpretation 5th edition page 316.
[2] See Benyion op cit pages 317 and 318.
[3] See letter dated 27th January 2011 from the Respondent's Attorneys to the court and to the Appellants.

which spirits are retailed, being kept by persons of doubtful character. Hence, even though the penalty was being imposed by reference to a past event (the conviction), it was not a consequence of that event. The statute was meant to protect society from future misconduct.

22. The present matter is readily distinguished from the exception relied on since the present matter is not a penalty case. Further, this is not a case of protecting society against future misconduct. Ninety per cent shareholding in a public company trading on the stock exchange is not in itself "misconduct".

This present matter is a case where statute imposes new obligations and duties in respect of a 90% shareholding in a public company trading on the Stock Exchange. In keeping with the principles stated at paragraphs 18 to 20 above, such statutes are not to be interpreted as applying to acts already past.

In all the circumstances, the alleged exception to the principle against retrospectivity does not apply here.

B. The Ex-Gratia Payment Offer of 1st June 2009

23. The Respondent's case on this issue is that the provisions of By-Law 26 have the potential to address the Ex-Gratia Payment offer of the 1st June 2009. In the argument that follows, I will make certain presumptions so as to assess the Respondent's case at its highest. These presumptions are:- (a) The Ex-Gratia Payment offer can be an offer to acquire shares. In this regard, I agree with paragraph 23 of the decision of the trial judge that this is a triable issue and as such should not operate as a bar to the prosecution of this matter at this preliminary stage. (b) This Ex-Gratia Payment offer was taken up by at least one minority shareholder (see paragraphs 24-26 of the decision of the trial judge). Again, this is a triable issue that should not operate as a bar to the prosecution of this matter at this stage. (c) That there need not be a take over bid, per se, for By-Law 26 to operate. I will expand on this last point later in this judgment under the heading Other Issues.

24. Once these presumptions are made, then By-Law 26 may otherwise have been applicable here (see paragraphs 9 – 13 above) since BWIA can be an offeree issuer; the GORTT can be an offeror and the Respondent can be the holder of securities not counted for the determination of a 90% or more shareholding.

25. The Respondent argues that By-Law 26 applies to situations where 90% or more of shares "are acquired". It applies whenever a 90% shareholding threshold is crossed. Hence it creates continuing obligations in respect of buy out and/or fair value remedies whenever an offeror acquires any more shares beyond a 90% shareholding in a public company trading on the stock exchange.

26. I disagree with this argument.

27. The buy out/fair value provisions in By-Law 26 are new rights/obligations for the protection of minority shareholders. Indeed, this part of the By-Laws (Part IX) is headed "Minority Security Holders Rights and Defensive Tactics".

A minority shareholder would have received the benefit of the rights created by By-Law 26 once he has accepted a buy out, or upon the determination of fair value proceedings in a Court. To give continuing rights of buy out/fair value proceedings to a shareholder is to go beyond protecting minority shareholders. It is akin to punishing majority shareholders.

Indeed, I ask rhetorically, why must a minority shareholder have more than one bite at the cherry? And, is this continued over protection proper in a business environment?

28. Further, the buy out/fair value remedies are onerous responsibilities. They mandate notices to all minority shareholders in some cases and also possible, protracted and complicated Court and Court annexed procedures. To construe the buy out/fair value obligations as continuing obligations could create the absurd and unbusinesslike situation of having cumbersome, costly and protracted proceedings every time a majority shareholder acquires even one more share. This is contrary to other principles of statutory interpretation (i.e. the principle against absurdity and the principle against inconvenience in business).[4]

[4] See Maxwell on the Interpretation of Statutes op cit page 210 and Benyion op cit pages 969 and page 980.

In fact, Counsel for the Respondent referred the Court to other legislation where a continuing obligation is expressly provided for upon the further acquisition of a stated percentage increase in shareholding (e.g. 2% increase) which would trigger continuing buy out/ fair value provisions.[5] If By-Law 26 were to have the effect as a continuing obligation it should have been expressly provided for in the By-Laws. This is not the case here.

29. As I found before (see paragraphs 8 and 16 above), By-Law 26 did not apply to the rights issue of June 2004. When the GORTT acquired 97.2% of the shares in BWIA in 2004 the buy out/fair value provisions were not then applicable, nor were they applicable retrospectively. That being the case any later share acquisition by the GORTT in BWIA was not the subject of a continuing obligation of buy out/fair value remedies. So that even if the other presumptions are made in favour of the Respondent, the Ex-Gratia Payment offer of 1st June 2009 and further acquisition of shares consequent upon such an "offer" did not invoke the provisions of By-Law 26.

OTHER ISSUES

30. My analysis of the jurisdiction issue has proceeded upon certain presumptions being made in favour of the Respondents. These presumptions were made so as to assess the Respondent's case at its highest, especially since the matter is only at its very preliminary stages. I have held that even taken at its highest the Respondent's case cannot proceed. Neither the rights issue of 2004 nor the Ex-Gratia Payment offer in 2009 gives the Court jurisdiction to invoke the fair value remedies of By-Law 26.

This is enough to determine this case. However, Counsel have asked the Court to address other issues that are of concern to the securities industry, especially since there are no guidelines on these issues. I will proceed to address three of these issues, they are:-

(i) Whether By-Law 26 can only be invoked in the face of a takeover bid?

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[5] See the Respondent's Written Submissions filed 14th January 2011 at page 18.

(ii) Whether there could be an offeree issuer or offeror in circumstances such as these?

(iii) Did the "Take Over Code" have any binding force in this case?

31. On these issues, my opinion is as follows:

(i) By-Law 26 can be invoked in a proper case even if there is no immediate or concurrent take over bid

(ii) BWIA could have been an offeree issuer and the GORTT could have been an offeror in this case

(iii) The Take Over Code had no binding effect in this case.

32. Before proceeding on these other issues, I must point out that the analysis is being considered upon premises that are at least arguable. These presumptions may or may not apply in any future case.

(i) By-Law 26 can be invoked in a proper case even in the absence of an immediate or concurrent take over bid.

33. The By-Laws were made pursuant to section 131(2) of the Securities Industry Act (the S.I.A.). Section 131 (2) of the S.I.A. provides that the relevant Minister may, on the recommendation of the SEC make Bye-Laws governing takeovers in respect of public companies. The Appellants argue that all the By-Laws in the 2005 Take-Over By-Laws must be subject to the existence of a take over or a take over bid. In fact, the official title of the By-Laws is "The Securities Industry (Take-Over) By-Laws, 2005". The Appellants argue that since neither the rights issue of 2004 nor the Ex-Gratia Payment offer of 2009 were affairs in pursuance of a take over or take over bid, these affairs cannot be the subject to the buy out and/or fair value remedies of By-Law 26.

34. I disagree.

35. Section 131 (4) of the S.I.A. provides that without prejudice to the generality of section 131(2) of the S.I.A. (referred to above in paragraph 34), bye-laws made thereunder may include:

> (g) the requirements to protect minority interests
>
> (a) the level of acquisition of voting rights by a person... at which an offer to all shareholders of the relevant shares shall become mandatory and the conditions applying to such offers.

36. Section 131(4) of the S.I.A. specifically authorizes the making of bye-laws independently of a take over or take over bid for the protection of minority interests [section 131(4)(g)] and/or for buy out and related issues upon certain major acquisitions [section 131 (4) (a)]. This latter provision can also include conditions such as a fair value remedy.

By-Law 26 which provides for both the protection of minority interests and for buy out/fair value remedies at a 90% acquisition level, could operate independently of a take over or take over bid.

(ii) BWIA could have been an offeree issuer and the GORT could have been an offeror in this case.

37. The divergence of opinion on this issue stems from the provisions of By-Law 26 (1). The relevant part of 26 (1) stipulates that 90% or more of the shares of "the offeree issuer" are acquired by an "offeror".

"BWIA an offeree issuer"

38. An offeree issuer as defined in By-Law 2 "means an issuer:-

> (a) whose securities are the subject of a take over bid, an issuer bid or an offer to acquire..." (my emphasis).

The Appellants argue that neither the rights issue by BWIA of 2004 nor the Ex-Gratia Payment offer by the GORTT in 2009 were made by an offeree issuer since the securities in these events were not the subject of a take over bid, an issuer bid or an offer to acquire.

I disagree. In both the rights issue and the Ex-Gratia Payment offer, the securities (shares) could have been the subject of an offer to acquire as defined in By-Law 2.

39. By-Law 2 also provides that "an offer to acquire" includes:-

(a) an offer to purchase, or a solicitation of an offer to sell securities; or

(b) an acceptance of an offer to sell securities ... and the person accepting an offer to sell shall be deemed to be making an offer to acquire from the person that made the offer to sell;" (my emphasis of the deeming proviso)

With respect to the rights issue of 2004 at TT$0.20 cents per share; when the rights issue was taken up by the GORTT it could arguably have been the acceptance of an offer by BWIA to sell securities under part (b) of the definition of an offer to acquire. Alternatively, because of the deeming proviso of part (b) of the definition above, even if the GORTT merely accepted an offer by BWIA to sell its shares at TT$0.20 cents per share, this too could arguably be deemed to be an offer to acquire shares by the GORTT.

Therefore, solely for the purposes of the definition of "offeree issuer",[6] BWIA's shares could arguably have been the subject of an offer to acquire by virtue of the rights issue.

40. With respect to the Ex-Gratia Payment offer of 2009, again, it is at least arguable at this preliminary stage of the proceedings that this was an offer to purchase shares in BWIA (see paragraph 24 above). In that case it would fall under Part (a) of the definition of "offer to acquire".[7] Alternatively, it could be construed as an offer by minority shareholders to sell their securities to the GORTT, hence under the deeming proviso of the definition of offer to acquire,[8] if this were accepted by the GORTT, it would be deemed to be an offer by the GORTT to acquire these shares.

In either event, for the purposes of the definition of "offeree issuer", BWIA shares could have been the subject of an offer to acquire by virtue of the Ex-Gratia Payment offer of 2009.

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[6] See paragraph 38 above.
[7] See paragraph 39 above.
[8] See paragraph 39 above.

"The GORTT an offeror"

41. By-Law 2 provides that "offeror" means a person who makes … an offer to acquire."

42. The Appellants argue that in neither the rights issue nor in the Ex-Gratia Payment offer, the GORTT could have been making an offer to acquire shares.

43. I disagree.

44. With Respect to the rights issue: By virtue of the deeming proviso of the definition of "offer to acquire", it is at least arguable that even if BWIA were making the offer to sell its shares at TT$0.20 cents per share, when the GORTT accepted this "offer", it was deemed to be making an offer to acquire shares from BWIA.

45. With respect to the Ex-Gratia Payment offer of 2009, it is at least arguable that this could fall under the definition of an offer to acquire under either part (a) of the definition of offer to acquire or under the deeming proviso in part (b) of that definition (and see paragraphs 39 and 40 above). Hence the GORTT could have been making an offer to acquire BWIA shares in the Ex-Gratia Payment offer and could be an "offeror" as defined in By-Law 2 above.

(iii) The Take Over Code had no binding effect in this case.

46. In paragraphs 14-16 of his Decision, the trial judge makes reference to the "Take Over Code". It was also referred to in oral submissions at the Court of Appeal and it may have had some bearing on this case in relation to decisions of the SEC as to the rights of the minority shareholders.

47. Before becoming law, the By-Laws had been published in the form of a Take Over Code. They were discussed at a public forum in 2003. In 2004 the Code was presented to the Minister of Finance for enactment into law. This was not done till March 2005 (see paragraph 14 of the Decision of the trial judge).

48. As was stated above in paragraph 6(g), the Stock Exchange made an application to the SEC to de-list the shares of BWIA. The SEC decided to de-list BWIA shares on the 22nd December 2006. In giving its decision to de-list BWIA shares, the SEC stated (inter alia) that there should have been compliance with the spirit of the Take Over Code and By-Law 26 in respect of the Rights Issue of 2004.

The trial judge noted this statement but decided that the GORTT had no legal obligation to abide by By-Law 26 (and presumably the Take Over Code) in respect of the rights issue.

49. I too agree with this. At the time of the rights issue in 2004, the Take Over Code was only a document that was propounded for the consideration of the GORTT. It gave no rights to anyone nor did the GORTT act on it in any way before it became law. No one could rely on the Take Over Code as a source of rights in a Court. It had no legal effect on the rights issue.

CONCLUSION:

50. In all the circumstances, I will allow this Appeal and will hear Counsel on the question of costs.

Gregory Smith
Justice of Appeal